Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STATE OF IDAHO,

Petitioner,

vs.

BRYAN STUART LANKFORD,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Supreme Court of Idaho after remand was inconsistent with this Court's opinion in *Lankford v. Idaho*, 500 U.S. 110 (1991).

2. Whether *Santobello v. New York* requires that a prosecuting attorney's recommendation for a life sentence be enforced on resentencing after remand by this Court, even though circumstances have changed.

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PETITION FOR WRIT OF CERTIORARI

The State of Idaho brings this petition to secure compliance with this Court's opinion in *Lankford v. Idaho*, 500 U.S. 110 (1991), a capital case. In *Lankford*, the Court ordered resentencing to insure that the penalty was based on attributes of notice that would guarantee the integrity of the adversary process. The Idaho courts frustrated this objective by excluding the State from the adversary process on the theory that such relief was required by constitutional protections against vindictive prosecution and breach of agreements.

OPINION BELOW

The opinion of the Idaho Supreme Court is reported as *State v. Lankford*, 903 P.2d 1305 (Idaho 1995), *rehearing denied*, October 30, 1995. A copy of the opinion is reproduced as an appendix to this petition.

JURISDICTION

The State of Idaho invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Procedural and Factual Background

In 1984, Bryan Lankford was sentenced to death for the murders of Robert Bravence, a Marine Corps officer, and his wife, Cheryl. The Bravences were murdered to facilitate the theft of their car and credit cards. *See State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987). While Bryan used a shotgun to prevent the victims from resisting, Mark, Bryan's brother, beat them to death with a police nightstick. *Id.* The Bravences had been beaten with such force that their skulls had to be reconstructed by a forensic anthropologist before the cause of death could be scientifically determined. *Lankford, supra.*

After Bryan Lankford was convicted, but before he was sentenced, he was granted immunity by the prosecuting attorney in order to obtain his testimony in the separate prosecution against Mark Lankford. The immunity agreement was intended solely to protect Bryan Lankford from prosecution for crimes, other than the murders of which he had been convicted, which might be revealed in the course of his testimony in Mark Lankford's trial. Although Lankford argued that the immunity agreement prevented the state from imposing sentence upon him, the Idaho Supreme Court held otherwise. *Id.*

The scope of the immunity agreement was described for the trial judge in the course of the prosecution against Mark Lankford. The ensuing discussion is relevant in light of the Idaho Supreme Court's holding that a claimed relationship between the immunity agreement and the prosecutor's later sentencing recommendation established a violation of *Santobello v. New York*, 404 U.S. 257 (1971).

First, the prosecutor informed the court and Lankford of the scope of the immunity agreement in order to obtain judicial approval:

> THE COURT: That hasn't been executed at this time. Perhaps, Mr. Albers, if you could set forth the factual situation surrounding the immunity agreement, I'll make a determination on that at this time.
>
> MR. ALBERS: We met with Mr. Longeteig, Mr. Bryan Lankford's attorney, and Bryan Lankford agreed at that time earlier, and, then, it was reduced to writing by Mr. Longeteig and typed by my secretary. That we would grant immunity to – we would agree to grant immunity to Bryan Lankford on account of any further prosecution which his testimony might incriminate him surrounding in relation to potential crimes that would be – that have not yet been prosecuted. That is my understanding. Of course, Longeteig and by Bryan Lankford's consent that was agreeable.
>
> THE COURT: Does the state have anything in mind with reference to this particular matter concerning possible incriminating evidence?

MR. ALBERS: Well, I would assume, from a theoretical point of view, that it was possible to allege a robbery or possession of stolen property, and would not be – it was never my intention to do that anyway. But just for protection and at request of counsel I was willing to go ahead and execute the agreement.

THE COURT: Was this one factor, Mr. Longeteig, that entered into your consideration?

MR. LONGETEIG: Very definitely, your Honor. Mr. Lankford originally was – Bryan Lankford – was charged with the robbery in the initial complaint. That matter was dismissed at the preliminary hearing for insufficiency of evidence. But legally, of course, he could be charged again, and we feel that we want to foreclose that possibility.

THE COURT: Well, I've reviewed the immunity agreement, and I certainly feel that the approval of the same would not be contrary to the public interest and as a consequence, I'll execute the same, and approve the same. (Tr., *State v. Mark Henry Lankford*, No. 15759, pp.1258-1260.)

Later, in the course of the following discussion before the court, the prosecutor took steps to make clear that there was no agreement respecting the imposition of sentence on Bryan Lankford:

Q [BY MR. ALBERS]: Mr. Longe- Mr. Lankford, did – during our meeting the other night was there any promise or did I say anything about what would happen at sentencing, in any way?

A [BY BRYAN LANKFORD]: I'm not for sure. I would like to stipulate though that we did have a meeting before, as I think about it. One before that.

Q: And where was that?

A: I believe the judge was in there then, and Bill; in a little room right before my trial.

Q: Oh, excuse me. That was to indicate whether or not you were going to testify?

A: Right.

Q: All right. And you had indicated at that time that you would?

A: Right. Testify at my trial.

Q: And at that time – at that time did I also discuss briefly the things you should not say on the witness stand in relation to other crimes?

A: That's correct.

Q: At that time there was no discussion about sentencing?

A: No, sir.

Q: And there was no discussion Monday night about sentencing?

A: I'm not for sure, to tell you the truth.

MR. ALBERS: Well, your Honor –

A: I know I've heard it from several sources, but I don't know whether or not that you might be one of those or not.

Q: Okay.

A: Where that came from you –

MR. ALBERS: Your Honor, in these circumstances the record amply shows what was occurring this past Monday night, and with the brief other meeting, was that I was preparing for this testimony, and that that under the discovery rules of 26.3 and so on, will be nothing other than work product. The evidence demonstrates that the stories of information received is as of as he said in his own trial. Counsel has a full transcript of that. The immunity agreement there was no discussions about that this past Monday night. That only occurred as a result of Mr. Longeteig's rethinking the circumstances; he having drafted the agreement and had it typed, it was executed yesterday afternoon. Counsel was furnished a copy of it as immediately after that as possible.

The record demonstrates there is no promise on my part for any recommendation sentencing wise. The only thing, and it's in the records of this court, counsel – *Mr. Longeteig in the courtroom earlier asked whether or not I was going to recommend capital punishment, and that is on the record, and I said that I did not think so, but I was going to reserve judgment in that regard until the psychological evaluations were done.* And that is the only thing that exists. Otherwise, counsel has full knowledge of all the proceedings and my taking of notes as simple assistance in the preparation for this case, and particularly in view of the court's motion in limine, I had to do that in order to tell him what he could not say, so that a mistrial would not be granted, and be careful in

> that regard. (Tr., *State v. Mark Lankford*, pp.1266-1268.) (Emphasis added.)

At that point, Lankford's trial counsel, Wilford W. Longeteig, was called.[1] Mr. Longeteig testified that no promise had been made to Lankford concerning a sentencing recommendation and that such a recommendation would not have been important to him in any event:

> MR. LONGETEIG: I'm aware of none. I've never asked for any because very frankly the judge does the sentencing and the prosecutor's recommendations are to me fairly meaningless, with all due respect. (Tr., *State v. Mark Lankford*, p.1271, Ls.14-17.) (*See also, Id.*, p.1273, Ls.20-25; p.1274, Ls.1-2.)[2]

After the foregoing occurrences had taken place, Lankford was asked if he wished to go forward with his testimony on the understanding that there would be no sentencing agreement. Both Lankford and his attorney tried to characterize their personal hope as part of a promise of leniency but Lankford was pointedly challenged about this representation by the prosecutor.

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[1] It should not be forgotten that all of this occurred *before* Bryan Lankford testified at Mark Lankford's trial. The Idaho Supreme Court's observation that Lankford testified in reliance on a promise for a sentencing recommendation is incorrect in light of the fact that the lack of such a recommendation was made clear prior to the time he testified.

[2] At one point, Mr. Albers did in fact offer a recommendation for an indeterminate life sentence in exchange for a plea of guilty. Lankford did not accept this offer and no agreement was reached. (Tr., *State v. Mark Lankford*, No. 15759, p.1274.)

Q [BY MR. FITZMAURICE]: Mr. Lankford, you've heard your counsel testify. It is your understanding at this point in time that you are being given nothing in exchange for your testimony other than your immunity agreement?

A: Yes.

Q: It's your understanding that there will be recommendation that you are to be given an indeterminate life sentence or less than a death sentence if you are to testify?

A: Yes, sir.

THE COURT: Do you have any further questions?

Q [BY MR. ALBERS]: Mr. Lankford, how is it that you, in view of your counsel's testimony, how – what do you rely on for that?

A: What do I rely on?

Q: Yes.

A: I rely on my counsel since he is my counsel.

Q: Okay.

A: And he's told me that I would not get the death penalty. And there was discussion this week about getting an indeterminate life sentence and also that I will not be placed in the Boise penitentiary.[3]

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[3] Tr., *State v. Mark Lankford*, pp.1275-1276.

The foregoing testimony does not support the court's conclusion that Lankford's expectation of a specific sentencing recommendation had to be considered the constitutional equivalent of a plea bargain agreement. It shows instead that Lankford's expectation was nothing more than an expression of defense counsel's judgment that Lankford would not likely be sentenced to death. The prosecutor took additional steps to make this clear:

> BRYAN LANKFORD: I don't know whether it's [my attorney's opinion] or if it's a fact. I don't know.
>
> * * *
>
> Q [BY MR. ALBERS]: Okay. There was discussion that if you were incarcerated there would be every opportunity to try to not put you in the same place your brother would be?
>
> A: This is correct.
>
> Q: Those things were communicated to you as assurances, were they not, rather than promises? Every opportunity would be taken to see that that didn't happen? For your security?
>
> A: Whatever is in y'all's power I'm sure. (*Id.*, pp.1276-1277.)

The only promise that inferably emerges from this testimony is that the prosecutor assured Lankford that he would attempt to prevent his incarceration in the same place as his brother, Mark.[4]

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[4] It is hard to read this testimony as some kind of assurance that Lankford would not get the death penalty. He could anticipate, as circumstances have certainly revealed, that even

In connection with the sentencing hearing, at which Lankford presented several witnesses in mitigation, the prosecuting attorney recommended a sentence less than death. The recommendation, as noted, was not the product of any agreement between the state and Bryan Lankford. No plea was entered in this case; Lankford was convicted by a jury.

Notwithstanding the prosecutor's eventual recommendation for a life sentence, the trial court held that a sentence less than death "would be contrary to the best interests of society. It would . . . depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process." Lankford was sentenced to death upon findings made in accordance with Idaho's capital sentencing statute. Idaho Code § 19-2515, that the murder was one of multiple murders and that it was committed in the course of a robbery accompanied by the specific intent to cause death.

Lankford's conviction and sentence were affirmed on review by the Idaho Supreme Court. *State v. Lankford*, *supra*. In 1991, however, this Court vacated Lankford's death sentence on the ground that there was a risk that Lankford's sentencing counsel, Joan Fisher, had not adequately prepared for sentencing as a consequence of the prosecuting attorney's recommendation for a sentence other than death. *Lankford v. Idaho*, 500 U.S. 110 (1992).

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with a death sentence there would be a period of incarceration prior to the time sentence was carried out. The reference to conditions of incarceration did not imply that the sentence would be a term of years instead of the death penalty.

The case was remanded for *resentencing*. The resentencing proceeding did not take place before the original trial judge. Instead, another judge, the Honorable Ronald Schilling, was designated to hear the resentencing evidence. Lankford demanded that the state be forbidden to make a recommendation for sentencing and that it be precluded from even participating in the resentencing hearing. Judge Schilling, in response, prevented the state from making a sentencing recommendation but held that the state would be permitted to examine witnesses, present evidence, and make argument in favor of any sentence authorized by law.

At the conclusion of the sentencing proceeding, Judge Schilling decided against reimposing the death penalty, in part because he had not tried the case and could not make "the necessary finding concerning Bryan Lankford's state of mind beyond a reasonable doubt." Judge Schilling believed, mistakenly in the State's view, that Lankford was not eligible for the death penalty except upon proof that he "intended" that the Bravences be killed. *Cf., Tison v. Arizona*, 481 U.S. 137 (reckless indifference to human life is sufficient to warrant a death penalty and a person who facilitates a murder may be found to have the requisite personal culpability); *Cf., State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983); *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983) (aiders and abettors may be liable for the death penalty). Nonetheless, the judge did not find Lankford's case for mitigation credible. ("[Lankford] has lied under oath, he lied to get out of the military, he lied so that he and his brother could avoid responsibility for their crime.") Judge Schilling observed, in the course of making formal findings,

that Lankford was remorseless about the deaths of Robert and Cheryl Bravence, although highly sympathetic to himself, and his personal culpability was high:

> THE COURT: The most serious harm was caused by the defendant. This was not the defendant's first offense and, in fact, two people were killed with this defendant's help. Neither victim was at fault or contributed to their deaths. There was no excuse or justification for either murder. There was no provocation for either murder. . . . The defendant is a dangerous offender. . . . If [he] is ever released from custody, another offense is likely and the defendant is in need of institutional treatment.

The court also found that the crime was coldly premeditated by Lankford and his brother, and that the protection of the public demanded his permanent incarceration. Accordingly, Judge Schilling sentenced Lankford to two fixed consecutive life terms. Lankford responded by saying, "I just want to say I love you in spite of your evilness."

Lankford appealed the sentence and complained that the trial court had failed to enforce an agreement for a sentence recommendation which he claimed was inferable from the existence of the immunity agreement.

The Idaho Supreme Court held that *Santobello v. New York* made it impermissible for the state to make any recommendation or to argue in favor of any penalty higher than that unilaterally advocated by the prosecuting attorney at the time of Lankford's original sentencing. It returned the case for another sentencing proceeding, to be conducted by yet another judge, with instructions that

the State be required to recommend an indeterminate life sentence and be forbidden to present evidence in aggravation. App. 24.

SUMMARY OF ARGUMENT

1. This Court returned Bryan Lankford's case to the Idaho courts for resentencing because a majority of the Court concluded that the prosecuting attorney's recommendation for a sentence less than death had caused Defendant's counsel to be unprepared for sentencing. In part, this finding was based on the circumstance that the trial judge had not given sufficient notice that he did not intend to be bound by the prosecutor's recommendation. Although this decision was not, in any respect, based on the breach of an agreement between the State and the Defendant, or upon any claim of prosecutorial vindictiveness, the Idaho courts concluded that federal law prevented the prosecuting attorney from making a different recommendation on resentencing and also prevented the prosecuting attorney from offering aggravating evidence at the resentencing proceeding. This decision would result in the State's inability to rebut evidence that was false or incredible.

2. This Court vacated the previous death sentence imposed on Bryan Lankford and returned the case for resentencing in order to ensure that the adversarial process would result in a sentencing decision based on all of the facts. The judgment of the Idaho Supreme Court was inconsistent with the opinion upon which this Court vacated the prior judgment.

3. The Idaho Supreme Court's decision, which is inconsistent with this Court's prior opinion, springs from an application of rules of prosecutorial vindictiveness and breach of agreement that are contrary to this Court's cases and those of other courts of last resort.

4. Prosecutorial vindictiveness cannot, consistent with this Court's cases, be presumed from a change of sentencing recommendation by the prosecuting attorney based on changed circumstances.

5. The Idaho Supreme Court has improperly extended *Santobello v. New York* beyond its rationale. Where there is no plea agreement and the defendant has not changed position in reliance on a promise by the State, a change of sentencing recommendation on resentencing does not violate *Santobello v. New York*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The Decision Of The Idaho Supreme Court Is Inconsistent With This Court's Mandate In *Lankford v. Idaho*, 500 U.S. 110 (1991)

This Court held in *Lankford v. Idaho*, 500 U.S. 110 (1991), that the purposes to be served by the adversarial process necessitated resort to a new sentencing proceeding as a means to ensure that all the facts were placed before the sentencing judge. The Court concluded that the prosecuting attorney's recommendation for a sentence other than death, coupled with the sentencing

judge's subsequent omission to reemphasize the possibility of the death penalty, had undermined the adversary process by leaving it open to Lankford's counsel to underestimate what was at stake. Because the Court acknowledged the availability of the death penalty for the crime Lankford committed, and in fact decided as it did because of the availability of the death penalty, see 500 U.S. at 124-125, and because the decision of this Court had returned the case to its presentencing status, the State notified the court and counsel that it intended to seek the death penalty at the new sentencing proceeding.

It is important that the State's resentencing recommendation was made following a substantial change of circumstances. Between the time the first prosecuting attorney made his recommendation for a life sentence and the resentencing proceeding, the sentencing judge had in fact imposed a death sentence. The State was obligated to argue on appeal that it be upheld, and the State succeeded in the argument. The Idaho Supreme Court, upon review of the sentence, found that it was not excessive and that it was supported by the evidence. *State v. Lankford, supra.* The State's task at resentencing, consistent with this Court's opinion in *Lankford v. Idaho, supra,* was to make a full advocative presentation which, at this point, necessitated that it be recognized that a death sentence had been previously imposed, found to have been supported by the evidence, and was vacated only because of a failure of notice.

The state courts were instructed by this Court to ensure that the sentencing proceeding was fully adversarial. They did the opposite. First, Lankford insisted that

the State be precluded from recommending a death sentence or even presenting evidence that would support a death sentence. This demand impelled the sentencing judge to construct an unusual interpretation of this Court's cases, which led to the conclusion that the State had breached an agreement for a recommendation and that this breach raised a presumption of prosecutorial vindictiveness. Although the Court's decision in *Lankford v. Idaho* was not based on vindictiveness or breach of an agreement, *see State v. Lankford*, 116 Idaho 279, 775 P.2d 593 (1989) (immunity agreement merely protected Lankford from prosecution for *other* crimes), the judgment of the Idaho Supreme Court proceeds on an assumption that this Court's authority required such a restructuring of the adversary process. The consequence is that the sentence for a brutal murder has now been whittled down from death to an indeterminate term that could result in Lankford's almost immediate release on parole.

In the course of attempting to carry out the Court's mandate, the Idaho courts misapplied federal law. Judge Schilling, the sentencing judge, found a "promise" to recommend an indeterminate life sentence could be extracted from certain ambiguous and self-serving comments of Lankford and his counsel and although this "promise" was not memorialized in writing, or acknowledged by the prosecutor, it was "enforceable" under *Santobello v. New York*, 404 U.S. 257 (1971). He concluded that *Santobello* not only required the original prosecutor to recommend a sentence less than death, but that this recommendation was binding at resentencing, notwithstanding a substantial change of circumstances in the interim and the fact that Lankford placed no reliance whatever on

the prosecutor's original recommendation in preparing for the resentencing proceeding.

Judge Schilling also held that the state, having created a constitutionally enforceable interest, breached its promise by making a new recommendation in favor of a death sentence. The court relied on *Santobello v. New York* and cases decided in the federal circuits, including *State v. Ewing*, 480 F.2d 1141 (5th Cir. 1973). (Noting the contrary authority of *United States v. Arnett*, 628 F.2d 1162 (9th Cir. 1979), and *Brooks v. United States*, 708 F.2d 1280 (7th Cir. 1983).) The court's conclusion that there had been a breach of the State's promise led the court to an application of the constitutional due process rule against the imposition of vindictively motivated sentences. Judge Schilling found that although there was no actual vindictiveness on the State's part, it was a sufficient preliminary showing to create a presumption of vindictiveness "when a defendant's death sentence is reversed after a successful appeal, and the prosecution seeks the death penalty at resentencing after it had recommended a life sentence at the original sentencing." (R., Resentencing, p.377.) For this conclusion the court relied on this Court's decisions in *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Alabama v. Smith*, 490 U.S. 794 (1989); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

On the other hand, Judge Schilling relied on this Court's emphasis on the adversary relationship to resist a demand by Lankford to exclude the State from participation in the resentencing proceeding. At the same time, the judge thought that the due process rule of *North Carolina v. Pearce*, 395 U.S. 711 (1969) and related cases, coupled with this Court's decision in *Lankford* compelled some

kind of limited "remedy" for the State's decision to seek the death penalty the second time around:

> The court does not agree that the appropriate remedy is to remove the death penalty from all consideration at sentencing. The state's recommendation is not binding on this court, and cannot be used to expand the remedy to give the defendant an advantage beyond that to which he was originally entitled at his first sentencing. The finding of vindictive prosecution does not warrant such a remedy. There has been no allegation against this court that its intent to consider the death penalty is motivated by vindictiveness. It is the prosecution's misconduct which we seek to remedy at this time, not any action of the trial court.
>
> Since the court previously notified the parties that it intended to consider the death penalty as a possible sentence in this case, and still intends to consider the death penalty as a possible sentence, the appropriate remedy cannot be the exclusion of evidence in aggravation. It is the sentencing judge in Idaho, not the prosecutor, who decides what sentence is appropriate in a given case. To refuse to consider evidence in aggravation would unduly restrict the sentencing discretion afforded this court; would undermine the adversarial process vital to the implementation of our system of justice, see, *Lankford v. Iduho, supra* . . . and would controvert the expressed intent of I.C.R. 33.1 (court shall hear all relevant evidence and arguments of counsel in aggravation and mitigation of the offense as provided in section 19-2515, Idaho Code). The state will be allowed to present relevant, admissible evidence in aggravation at the

> resentencing, just as the defendant would be allowed to present relevant, admissible evidence in mitigation.
>
> In light of these considerations, the appropriate remedy is to grant the defendant's motions in part by (1) striking the state's notice of intent to seek the death penalty, and (2) considering the original sentencing recommendation at resentencing. The impact of this decision therefore is that the state cannot recommend a sentence or make an argument to this court, inconsistent with its original recommendation of an indeterminate life sentence. Clerk's Record, Resentencing, pp.31-32.

The Idaho Supreme Court not only agreed with the sentencing court's view that Lankford had a constitutional right to a renewal of the recommendation for a life sentence, it went much further and held, purporting to apply *Santobello v. New York*, that it was not permissible for the State to participate at all in the resentencing proceeding:

> We remand for resentencing in which the prosecution is obligated to make its initial recommendation for an indeterminate life sentence and is not allowed to present evidence in aggravation. Resentencing shall be conducted by a district judge who has not been exposed to the state's impermissible presentation of evidence in aggravation. App. 24.

By the misapplication of federal law, the courts below acted inconsistently with the decision of this Court. Instead of protecting the adversarial nature of the sentencing process, as this Court required by its opinion in

Lankford, the Idaho Supreme Court destroyed the adversarial process altogether.

II.

The Idaho Supreme Court's Holding Results From An Application Of Rules Against Prosecutorial Vindictiveness And Breach Of Plea Agreement That Are Contrary To This Court's Cases And Those Of Other Courts Of Last Resort

Prosecutorial Vindictiveness

The due process clause prevents the imposition of the sentence as a penalty for pursuing constitutionally guaranteed rights. *North Carolina v. Pearce, supra.* A *presumption* of vindictiveness arises from actions by the State that suggest a realistic likelihood of vindictiveness, such as an increase in the seriousness of the charge after the filing of an appeal. *Thigpen v. Roberts*, 468 U.S. 27 (1984); *Blackledge v. Perry*, 417 U.S. 21 (1974). On the other hand, where there is no actual evidence of vindictiveness, and no basis for a presumption of vindictiveness, no due process violation is established. *United States v. Goodwin*, 457 U.S. 368 (1982).

The Court has acknowledged that new sentencing judgments brought about by a fuller appreciation of facts than was available to the sentencing judge at the time of the prior proceeding does not manifest misconduct by the prosecution. *Alabama v. Smith*, 490 U.S. 794 (1989). Moreover, the right of the prosecuting attorney to make various pretrial decisions, including those related to plea bargaining, is treated with deference under the Constitution. Thus, in *Town of Newton v. Rumery*, 480 U.S. 386

(1987), the Court held that the possibility that release-dismissal agreements between the State and criminal defendants may tempt prosecutors to bring frivolous charges does not justify a per se rule of invalidity because it is improper to merely assume prosecutorial misconduct where there is no evidence of such:

> [Although there are some situations in which the court has presumed vindictive motive] . . . "the complexity of pretrial decisions by prosecutors suggests that judicial evaluation of those decisions should be especially deferential. Thus, the court has never accepted . . . a blanket claim [that the opportunity for vindictive pretrial decisions justifies a general prohibition]. 480 U.S. at 396-397.

Notwithstanding this rule, the Idaho courts presumed that a new sentencing recommendation, based on new factual considerations, was vindictive. This was so even though the trial court found that there was no actual vindictiveness involved.

The implications of this judgment are profound. When a court precludes one of the parties from making an adversarial presentation at a sentencing hearing, the reliability of the process is all but destroyed. The perceived need for a fully advocative sentencing presentation was the reason for this Court's action in vacating Lankford's original death sentence. The Idaho court's decision that the State must be prevented from making any adversarial presentation defeats this purpose and is the reason that the decision of the Supreme Court of Idaho is inconsistent with this Court's order remanding

the case for further proceedings "not inconsistent with this opinion." 500 U.S. at 128.

The Unwarranted Extension Of The Breach Of Promise Provisions Of *Santobello v. New York*

The Idaho Supreme Court purported to follow *Santobello v. New York*, 404 U.S. 257 (1971), and related cases for holding that the illusory agreement for a lenient recommendation should have been enforced in the court below. These cases furnish no support for the state court's decision. In the first place, *Santobello* was related to breach of plea agreements. Lankford entered no plea in reliance on a representation by the prosecuting attorney. There is a significant difference between entering a guilty plea and, as Lankford did, merely entertaining the hope of favorable treatment in return for cooperation. The Idaho court has extended *Santobello* beyond what is required.

Neither *Santobello* nor *Lankford v. Idaho*, 500 U.S. 110, 111 S. Ct. 1723 (1991), furnishes any basis for the Idaho court's holding that the State is not entitled to participate in the adversarial process on a resentencing proceeding where the prosecuting attorney unilaterally recommended a sentence less than death. The Court explained in *Santobello* that the decision was based on the element of unfairness inherent in denying a defendant what was reasonably due in the circumstance where he had so dramatically changed position as to enter a plea of guilty in reliance upon an unkept promise. "[A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be

said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 92 S. Ct. at 499. It is apparent in the record of this case and the related case of *State v. Mark Lankford* that Bryan Lankford gave up nothing in return for a promise by the prosecution. Even before he testified in Mark's case, the prosecutor reminded Lankford that his testimony against Mark Lankford was not tied to a favorable sentencing recommendation.

In *Lankford v. Idaho, supra*, the case which brought about the resentencing proceeding, the propelling concern of the Court was for a full adversarial exposition of the facts. The Court believed that this adversarial process was hampered by the ignorance of Lankford's counsel of the possibility that the death sentence might be imposed under Idaho law.

Even if *Santobello* could be applied as the Idaho Supreme Court applied it, it is difficult to understand why such an application would result in excluding the State from the adversary process. The aggravating evidence the State could have presented (presumably), even if it continued to recommend a sentence less than death, would not in any particular be different from the aggravating evidence offered in support of the death penalty. In either case, the sentence is to be based on all of the pertinent information the court can gather about the crime and the offender. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978). This principle is turned on its head by the Idaho court's conclusion that the defendant should, in this case, be entitled to present all of the mitigation he wishes, false

or not, but the state should not be entitled to respond to it or even to cross-examine the witnesses about it.

Lankford was returned by the decision in *Lankford v. Idaho, supra,* to a clean slate at resentencing. Implicitly, the Court's decision stands for this proposition. The prosecutor's original recommendation in such a case should have no greater force than the sentence which was set aside. Resentencing after a remand from the United States Supreme Court opens all sentencing prospects that were originally present. *See e.g., Sochor v. Florida,* 504 U.S. 527, 112 S. Ct. 2114 (1992); *Texas v. McCullough,* 475 U.S. 134, 106 S. Ct. 976 (1986); *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072 (1969) (even increased sentences may be imposed on reconviction, absent judicial vindictiveness); *Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S. Ct. 1977 (1973). Lankford had no right to complain of a new recommendation where he was to have a new sentencing hearing.

III.

The Decision Of The Idaho Supreme Court Is Inconsistent With The Holdings Of Other State Courts Of Last Resort

The Court held in *Chaffin v. Stynchcombe, supra,* and related cases that there is no constitutional expectation that a sentence once imposed will not be increased. It is thus difficult to follow the logic of the Supreme Court of Idaho that it is a violation of *Santobello v. New York* when the State seeks to have a previously imposed sentence reimposed. The notion that there can be an expectation

that a prior recommendation will be continued is completely inconsistent with the proposition that the Constitution does not protect a defendant from the imposition of a higher sentence after retrial. The decision of the Idaho Supreme Court, which extends *Santobello* well beyond its rationale, is inconsistent with the decision of other courts of last resort and with decisions by this Court.

In *State v. Loehmann*, 467 A.2d 118 (Vt. 1983), the Vermont Supreme Court held that *Santobello* does not compel relief where there is no prejudice, that is, where there is no misplaced reliance. In *Loehmann*, the prosecuting attorney stated during a hearing to consider the defendant's eligibility for the services of the public defender that the State was not seeking jail time in the case. Where the defendant asserted that this representation was binding in subsequent proceedings, the Vermont Supreme Court held that there was no right to a particular recommendation and the fact that one was given in a prior proceeding did entitle the defendant to the same recommendation in a subsequent proceeding arising out of the same facts. This decision applies *Santobello* contrary to the way the case was applied by the Idaho Supreme Court.

In *People v. Smith*, 827 P.2d 577 (Colo. 1991), the Colorado Supreme Court held that *Santobello* may not be interpreted to foreclose a trial court's sentencing discretion. *Santobello*, the Colorado Supreme Court concluded, permits a defendant to enforce a *plea agreement* but not to interfere with the court's sentencing discretion. By analogy, *Santobello* should not be interpreted to foreclose a

new recommendation for sentencing under new circumstances because to do so intrudes upon a prosecutor's discretion to make a recommendation and affects his discretion to enter into a plea bargain by making it too dangerous to do so. *Cf., People v. Siebert*, 507 N.W.2d 211 (Mich. App. 1993) (judge who accepts plea and sentences to less than a sentencing condition imposed by the prosecuting attorney as part of a plea agreement trespasses on the prosecutor's charging discretion).

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Court pointed out that the broad discretion of the prosecuting attorney in pretrial negotiations is viewed with deference, a position inconsistent with the view of the Idaho Supreme Court that a court may reach for a contrived way to find vindictiveness where none exists. *See Wasman v. United States*, 468 U.S. 559 (1984) (where presumption does not apply the defendant must affirmatively prove vindictiveness; a reason for imposing a greater sentence after a successful appeal and retrial must appear, but this requirement can be satisfied by the presence of relevant new information).

The Idaho Supreme Court has converted *Santobello v. New York* into a shield against the effective prosecution of crime. The decision undermines the expectation that criminal convictions and sentences will be based on reliable information.

CONCLUSION

Certiorari should be granted and the decision of the Idaho Supreme Court should be vacated.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 20672

STATE OF IDAHO, Plaintiff-Respondent, v. **BRYAN STUART LANKFORD,** Defendant-Appellant,	**Moscow, April 1995 Term** **1995 Opinion No. 121.** **Filed: September 1, 1995** **Frederick C. Lyon, Clerk**

Appeal from the District Court of the Second Judicial District, State of Idaho, Idaho County. Hon. Ron Schilling, District Judge.

Appeal from resentencing. *Sentences vacated and remanded for resentencing.*

Joan M. Fisher, Genesee, for defendant-appellant.

Hon. Larry EchoHawk, Attorney General, Michael Kane and Lynn E. Thomas Deputy Attorneys General, Boise, for respondent. Lynn E. Thomas, argued.

SCHROEDER, Justice

I. BACKGROUND AND PRIOR PROCEEDINGS

Bryan Stuart Lankford (Lankford) appeals from two consecutive life sentences which were imposed by the district court on resentencing. The case involves a complex history.

Lankford was convicted by a jury of two counts of First Degree Felony Murder in 1984:

Evidence at trial disclosed that in June, 1983, Lankford was living in Texas on probation for a robbery conviction. Lankford was arrested for a DUI violation. Fearing that this violation of his probation would lead to his imprisonment, he fled the state with his older brother, Mark Lankford, in the latter's car. The pair eventually made their way to Idaho County, where they camped in the forest near Grangeville. They concluded that, because the monthly payments on Mark Lankford's car were delinquent, the police would be searching for it and that they needed to abandon the car to avoid capture. They left the car in the woods covered with brush and set off to steal another car.

The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.

The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed

> under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight from the murder scene they purchased accommodations and food with the Bravences' credit card.

State v. Lankford, 113 Idaho 688, 691, 747 P.2d 710, 713 (1987).

Following post-conviction proceedings, Lankford filed a consolidated appeal. This Court affirmed the judgment and sentence in *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987). Most of the issues Lankford raised in that appeal are no longer of consequence in this appeal. However, as in the present appeal, Lankford sought enforcement of an immunity agreement according to his interpretation of the document. This Court reviewed the agreement and held that:

> After Lankford was convicted of two counts of felony murder, but before sentencing, the state entered into an immunity agreement with him under I.C. § 19-1114 in order to obtain his testimony against his brother. Lankford contends that this grant of immunity (which was after the verdict but prior to his sentencing) deprived the district court of the authority to sentence the defendant. We conclude that the district court did not err when it found that the immunity agreement (Defendant's Exhibit #1) between the state and Lankford did not immunize Lankford from sentencing for the crimes for which he had already been convicted when the agreement was entered into.

> I.C. § 19-1114 states in part that, "If . . . the person would have been privileged to withhold the answer given . . . that person shall not be prosecuted or subject to penalty . . . *on account of any fact or act concerning which . . . he answered.*" (Emphasis added.) By its clear wording, the statute does not apply in this case. None of the testimony given by Lankford pursuant to the immunity agreement was used to prosecute or to punish Lankford. Instead of providing retroactive protection, the immunity agreement was prospective in effect and protected Lankford from any other charges that might have been brought pursuant to his use of the Bravences' property.

Id. at 695-96, 747 P.2d at 717-18 (footnote omitted). The Court elaborated on its reasoning in a footnote:

> Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:
>
> > "The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified on October 10, 1984 in the

> companion case, *State v. Mark Lankford*, Idaho County Case No. 20158, that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him."
>
> Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above.

113 Idaho at 696 n.7, 747 P.2d at 718 n.7.

Lankford sought review in the United States Supreme Court. The United States Supreme Court vacated this Court's judgment and remanded "for further consideration in light of *Satterwhite v. Texas*," 486 U.S. 249, 108 S. Ct. 1792, 100 L.Ed.2d 284 (1988). *Lankford v. Idaho*, 486 U.S. 1051, 108 S. Ct. 2815 (1988). Following the order of the United States Supreme Court, this Court in turn vacated its earlier remittitur and reheard the appeal. *State v. Lankford*, 114 Idaho 817, 761 P.2d 1169 (1988).

On rehearing this Court considered the holding in *Satterwhite* that harmless error applies to violations of the Sixth Amendment right set out in *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981) (in capital cases defendants have a right to confer with counsel before submitting to a

psychological examination aimed at determining future dangerousness). Noting that Lankford had at no point raised a Sixth Amendment violation, this Court nevertheless assumed "that *Satterwhite* applies equally where a [F]ifth [A]mendment violation is shown." *State v. Lankford*, 116 Idaho 279, 281, 775 P.2d 593, 595 (1989). The Court then quoted in its entirety footnote 7 from the original decision (set forth above) and held "we continue to adhere to the view expressed in footnote 7 of our original opinion. Accordingly, we find no factual predicate for Lankford's claim." *Id.* The Court then proceeded to outline an alternative holding that, even if it were assumed that the district court had considered Bryan Lankfords' [sic] testimony given at Mark Lankford's new trial hearing, no Fifth Amendment violation occurred because Bryan Lankford had waived his privilege against self-incrimination by voluntarily testifying in his own defense during his own trial. The Court also held that even if Lankford had not testified at his own trial the immunity agreement constituted a valid waiver of his Fifth Amendment privilege. The Court thus reaffirmed its prior decision.

Lankford successfully sought review in the United States Supreme Court a second time. The United States Supreme Court reversed this Court again, but on an issue entirely separate and unconnected to the *Satterwhite* issue which was the basis of the first order to vacate.[1] In

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[1] Other than detailing the procedural history of the case and making a passing mention of the earlier order vacating this Court's judgment and remanding to consider *Satterwhite*, the United States Supreme Court never discussed this Court's reaffirmation of its earlier ruling notwithstanding *Satterwhite*.

Lankford v. Idaho, 500 U.S. 110, 111 S. Ct. 1723 (1991), the United States Supreme Court held that Lankford's rights to due process of law were violated by the district court's imposition of the death penalty without giving Lankford sufficient notice that it might do so, because the state had earlier filed written notice that it would not request the death penalty. The judgment of this Court was reversed and the case was remanded "for further proceedings not inconsistent with this opinion." *Id* at 128, 111 S. Ct. at 1733.

This Court then remanded the case back to the district court. On motion of the Idaho County Prosecuting Attorney, the Attorney General's Office was appointed to prosecute the case in all further proceedings. The original sentencing judge, Judge Reinhardt, granted the defendant's motion for disqualification and the matter was assigned to Judge Schilling.

The Attorney General's Office then filed a "Notice of the Intention to Seek The Death Penalty." Thereafter the trial court filed a written notice that it intended to consider imposing the death penalty. Lankford filed a "Motion to Enforce Immunity Agreement" which was denied. Lankford also filed a "Motion to Strike State's Notice and Specifically Enforce Sentencing Agreement." The district court by written decision and order partially granted this motion.

Judge Schilling reviewed the record and the findings of Judge Reinhardt and held that the state had promised to recommend an indeterminate life sentence in exchange for Lankford's testimony and cooperation. The court held

that this promise was enforceable because the defendant's cooperation had already been rendered and could not be withdrawn. The court also held that the state's initial promise was still binding and enforceable at the resentencing despite the state's argument that the promise, if it existed, was only binding with respect to the initial sentencing. Before crafting a remedy for the enforcement of the sentencing agreement, the district court considered Lankford's claim that the prosecution's request for the death penalty at the resentencing was vindictive and therefore violated his rights to due process. The district court concluded that Lankford had made a sufficient showing to raise a presumption of vindictiveness which the prosecution had failed to rebut.

In order to enforce the original sentence agreement and remedy the prosecution's presumptively vindictive request for the death penalty, the district court struck the prosecution's request for the death penalty. The district court concluded that consideration of the state's initial sentencing recommendation should also be part of the appropriate remedy. However, the court reasoned that striking the non-binding request of the prosecution did not necessarily mandate exclusion of aggravating evidence or foreclose the court's ability to impose the death penalty.

A sentencing hearing was held at which the state was allowed to present evidence in aggravation. The district court thereafter made findings of fact according to the statutory factors of Idaho Code § 19-2515 and found that none of the aggravating circumstances outweighed the mitigating evidence such that a death sentence should be

imposed. The court filed a sentencing opinion sentencing Lankford to two consecutive fixed life terms.

Lankford then filed this appeal.

II. THE STATE'S BREACH OF THE AGREEMENT TO RECOMMEND AN INDETERMINATE LIFE SENTENCE

A. Existence Of The Agreement

The district court found that when Lankford was first sentenced there was a binding sentencing agreement whereby the prosecution agreed to recommend an indeterminate life sentence in exchange for his cooperation in the prosecution of his brother, Mark Lankford. The district court held that the original agreement was still binding at the resentencing. It is necessary to review the district court's finding that an agreement originally existed, because the state now maintains that such an agreement was never entered into.[2]

During the trial of Mark Lankford, Bryan Lankford was questioned about the existence of an agreement for a favorable sentence recommendation in exchange for his

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[2] At one point in its brief, the state appears to argue that there was an agreement for a recommendation but that Lankford breached the agreement through his successful appeals. At another point in its brief, the state seems to suggest that the immunity agreement represents the entirety of the agreement between the parties under which Lankford testified against his brother. At oral argument, the state directly challenged the existence of any agreement for a recommendation, characterizing the first prosecutor's recommendation for indeterminate life sentences as purely "gratuitous."

testimony and cooperation. Bryan Lankford's answers, although somewhat ambiguous and equivocal, made clear his belief that such a recommendation was forthcoming. At that point Bryan Lankford's trial counsel and the prosecutor both testified that no such agreement existed. The judge presiding at Mark Lankford's trial initially stated his belief that no such agreement existed and that Bryan Lankford was simply mistaken. However, the judge made no findings of fact to that effect and, despite Lankford's testimony that he believed such an agreement was in effect, the state proceeded to allow Lankford to testify without first making a record establishing that Lankford correctly understood the state of affairs. When the judge did make findings of fact in Mark Lankford's post-conviction proceeding, the judge's understanding had also apparently changed, because he found that in fact Bryan Lankford's testimony at Mark Lankford's trial was induced by "a life-sentence recommendation at sentencing." In 1993 Bryan Lankford's trial counsel filed an affidavit in the present case stating that Bryan Lankford's "decision to cooperate" was motivated by the prosecutor's promise "not to seek the death penalty." On the basis of this record, and in conjunction with the fact that in 1984 the state did actually make an affirmative recommendation that Lankford receive an indeterminate life sentence, the district court in this case found that an agreement had been entered into whereby the state agreed to recommend an indeterminate life sentence in exchange for Lankford's cooperation in the state's case against Mark Lankford.

The state points to no basis in the record for reversing the district court's conclusion about the existence of

the agreement. The state proceeded with the testimony of Bryan Lankford during Mark Lankford's trial knowing that Bryan Lankford believed it was pursuant to an agreement for a recommendation of an indeterminate life sentence. Moreover, the state apparently made no effort to challenge the finding of the trial court in Mark Lankford's post-conviction proceeding that such an agreement existed. Also unrebutted by the state is the 1993 affidavit filed in this case by Bryan Lankford's trial counsel. In summary, two different district courts have concluded that an agreement existed whereby Lankford was entitled to a recommendation for an indeterminate life sentence. The state has submitted no basis upon which to conclude otherwise.

B. Continued Enforcement Of The Agreement

The district court in this case recognized that even if Bryan Lankford forfeited no rights by testifying at his brother's trial, because of this Court's earlier holding that he waived his privilege against self-incrimination by testifying at his own trial, he had nonetheless provided the prosecution with cooperation. The district court concluded that the sentencing agreement was binding and was subject to specific enforcement at the resentencing, because it could not be retracted. The state maintains that this conclusion of the district court was erroneous, even if a sentencing agreement existed, because the agreement pertained only to the original sentencing.

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971), is the leading case recognizing the constitutional

dimensions of enforcement of plea bargaining agreements, but the authorities applying the principles of *Santobello* to enforce sentence agreements *after* the original sentencing has already taken place are limited. As the district court noted, some courts have held that the government does not breach a plea agreement where it fulfills its recommendation obligations at the defendant's sentencing but thereafter opposes the defendant's I.C.R. 35 motion for a reduction of sentence. *See, e.g., United States v. White*, 724 F.2d 714, 717 (8th Cir. 1984) (government's agreement not to recommend a particular type of sentence was not breached by its opposition to defendant's Rule 35 motion because by arguing to maintain a sentence already imposed the government did not "recommend" any particular type of sentence); *Brooks v. United States*, 708 F.2d 1280, 1282 (7th Cir. 1983) (government agreement not to oppose defendant's request for leniency at sentencing did not include a "free shot" by defendant in Rule 35 proceeding); *United States v. Arnett*, 628 F.2d 1162, 1164-65 (9th Cir. 1979) (government agreement not to make a recommendation does not bar the government from opposing motion to reduce because there was no evidence that such a restriction was contemplated by the parties); *Bergman v. Lefkowitz*, 569 F.2d 705, 716 (2d Cir. 1977) (where court disregards prosecutor's sentence recommendation made as part of plea agreement, prosecutor is free to later oppose defendant's motion to reduce).

Other courts have held that the government's agreement to take a certain position at sentencing forecloses its ability to later take an inconsistent position at a post-sentencing proceeding. *See United States v. Ewing*, 480 F.2d

1141, 1143 (5th Cir. 1973) (where plea agreement included an agreement by the government to recommend probation at sentencing, the government is also obligated to recommend a probationary sentence at I.C.R. 35 hearing because that is part of the sentencing process which the defendant was reasonably entitled to expect was included within the agreement); *State v. Wills*, 765 P.2d 1114, 1120 (Kan. 1988) (where plea agreement involving favorable sentencing recommendation by state was silent on state's obligations at hearing to modify sentence, ambiguity must be resolved in favor of defendant such that state is bound by earlier recommendation).

Although the two groups of cases disagree about the scope of proceedings encompassed within an agreement that on its face only addresses the initial sentencing, the unifying theme in all of the decisions is the holding that under *Santobello* a defendant is entitled to receive whatever benefit the state actually agreed to provide at the initial sentencing. The two lines of cases only disagree about whether in the individual case the post-sentencing proceedings were contemplated in the negotiations of the parties.

To accept the state's position in this case would necessitate acceptance of the assumption that Lankford and the state entered into an agreement that contemplated the unusual procedural developments in the case. The state would need to show that Lankford agreed to give testimony against his brother in exchange for a one time recommendation by the state for an indeterminate life sentence, but the recommendation would no longer be forthcoming should he successfully appeal and obtain resentencing. In the absence of any evidence in the record

suggesting that Lankford entered into such a short-sighted deal the district court correctly resolved the ambiguity in favor of Lankford.

Given the prosecution's initial failure to recommend an indeterminate life sentence at Lankford's resentencing, the next question is whether the district court crafted a sufficient remedy by striking the state's request for the death penalty and holding the state to a recommendation for an indeterminate life sentence.

Lankford argues that he is either entitled to sentencing before a judge who is "untainted" by the state's initial request for the death penalty or, alternatively, that this Court should go a step further and order that the state's recommended sentence actually be imposed. In support of this latter request, Lankford relies on *United States v. O'Brien*, 853 F.2d 522 (7th Cir. 1988). The court in *O'Brien* did not hold that the government had breached its obligations under the plea agreement, but the court nevertheless stated in dicta that a governmental breach could be remedied by "ordering the imposition of a specific sentence" if neither specific performance nor allowing the defendant to withdraw the plea would be an adequate remedy. *Id.* at 525-26.[3]

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[3] In mentioning the possibility of such an extraordinary remedy, the *O'Brien* court relied on the decision of the First Circuit in *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973). *Correale* was an unusual case where neither specific performance of the plea agreement nor allowing the defendant to withdraw his plea truly would have been adequate remedies. The defendant in *Correale* was serving a state sentence at the time that he entered into a plea agreement with federal prosecutors to resolve pending federal charges. The prosecution

There is no reason why true specific performance would be an inadequate remedy in this case. Lankford argues that it would be more expeditious for this Court simply to modify the sentence on appeal, but economy of time is an insufficient justification for transforming the government's non-binding recommendation into a stipulated sentence by ordering that it be imposed.

Lankford's next claim is that the remedy crafted by the sentencing judge did not constitute true specific performance, because the sentencing judge had been exposed to the prosecution's impermissible request for a death sentence.

In *Santobello* the Supreme Court suggested that specific performance of a lenient sentence recommendation entitles the defendant to sentencing before a judge not exposed to the prosecution's more harsh recommendation made in breach of the agreement. The *Santobello* Court acknowledged that the sentencing judge had stated that he was not influenced by the prosecution's recommendation. Nonetheless, the Supreme Court reversed and

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promised to recommend a sentence which would effectively make the defendant parole-eligible on his federal sentence at the same time that he would become eligible for parole on his state sentence. At sentencing, the government made the promised sentence recommendation for a concurrent sentence. However, the government's recommendation was for a sentence that was not authorized under federal law and the defendant received a longer sentence. Accordingly, the appellate court molded a remedy to fit the situation and ordered that the defendant be released on a probationary sentence to be put in a position as close as possible to that originally promised by the government.

remanded with instructions that the state court decide whether to allow the defendant to withdraw his plea or instead order specific performance. Notably, the Supreme Court described specific performance as including resentencing "by a different judge." *Santobello*, 404 U.S. at 263, 92 S. Ct. at 499.

Picking up the Supreme Court's instruction in *Santobello*, lower courts have ordered that specific performance of sentencing agreements be carried out with a second sentencing before a different judge when faced with a prosecutor's initial breach of an agreement for a sentencing recommendation. For example, the Supreme Court of Montana upheld an order for resentencing before an "untainted" judge in which the prosecution was directed to "stick with plea agreement." *State v. Persak*, 847 P.2d 280, 282 (Mont. 1993) (quotations omitted). Similarly, the Court of Appeals of Oregon held that, where a prosecutor made a sentence recommendation other than that promised, it was necessary to vacate the sentencing and remand for a second sentencing "by a different circuit judge following a recommendation by the prosecutor which is consistent with the plea agreement." *Stone v. Cupp*, 592 P.2d 1044, 1046 (Or. App. 1979). The court in *Stone* felt this was necessary even though "the trial court was not influenced by the recommendation" because that "factor is immaterial under *Santobello*." *Id.* at 1045 n.1.

This case is different from *Santobello*, *Stone* and *Persak* in that the breach of the plea agreement in this case was discovered before sentencing took place. *Santobello* discussed specific performance as including resentencing by a different judge, but in *Santobello* the original judge had already imposed a sentence, having heard only the

impermissible recommendation. This was also the case in *Stone* and *Persak,* two cases where no court had held that the prosecution was in violation of the plea agreements until after the sentences had already been imposed. These cases did not address the question of the appropriate remedy when the breach of a sentencing agreement is discovered before sentencing, when the sentencing judge has an opportunity to take adequate remedial action. *Santobello* explicitly left to the state courts selection of the appropriate remedy for breach of a plea agreement. Resentencing should not be necessary if the breach is discovered before sentencing and an appropriate cure is adopted by the judge. Along this line, the fact that the sentencing judge is exposed to a sentencing recommendation that breaches a plea agreement should not in and of itself require transfer of the case to another judge if the breach is recognized and appropriate remedial action taken. The question presented in this case is whether adequate remedial action was taken to allow the sentence to stand.

III. INTRODUCTION OF EVIDENCE IN AGGRAVATION BY THE STATE

The sentencing judge correctly concluded that the fact that the state was barred from requesting the death penalty did not foreclose the court's own ability to consider imposition of a death sentence.[4] However, in allowing the state to put on evidence in aggravation, the

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[4] The state relies on *State v. Robbins,* 123 Idaho 527, 850 P.2d 176 (1993), and suggests that under *Robbins* there could be no vindictiveness *by the court* in this case because the sentence

district court effectively allowed the prosecution to advocate a position inconsistent with its promise to recommend an indeterminate life sentence, the most lenient sentence possible for a conviction of First Degree Murder. *Cf. State v. Little*, 645 A.2d 665, 669-70 (N.H. 1994) (prosecutor did not breach plea agreement for sentence recommendation by making agreed recommendation and also presenting evidence in aggravation because the judge possibly could have imposed a more lenient sentence than that suggested by the prosecution).

In addition to aggressively cross-examining the defense witnesses testifying in mitigation, the state presented the following evidence in aggravation: (1) testimony that Lankford had been a disruptive inmate while incarcerated on death row; (2) testimony by an expert witness that, based on psychological examinations of Lankford, he was a poor candidate for rehabilitation; and (3) testimony that one of the victims, Captain Bravence, was a combat-trained marine who could not have been subdued by Mark Lankford without Bryan Lankford's assistance due to Captain Bravence's knowledge of self-defense which would be contrary to Bryan Lankford's version of events.

Lankford received at resentencing was less severe than that initially imposed. However, as the district court understood and fully discussed, Lankford alleged *prosecutorial* vindictiveness of the type condemned in cases such as *State ex rel. Patterson v. Randall*, 637 S.W.2d 16 (Mo. 1982) (en banc) (where state did not initially seek death penalty, due process prevents state from seeking it after defendant's successful appeal and change of prosecutor).

In addition to the evidence itself the state made the following arguments based on the evidence: (1) that Lankford willingly participated in the murders and was not dominated by his older brother; (2) that Lankford was highly culpable because he had "forged the Bravences' names to travelers' checks and credit card slips;" (3) that Lankford was highly culpable because he made the arrangements for the two brothers to stay with a friend in Los Angeles after the murders; (4) that Lankford was "manipulative," "dishonest," and "dangerous;" (5) that the witnesses who testified on Lankford's behalf in mitigation were not credible; and (6) that the defense's expert witness' testimony about Lankford's psychological condition was unreliable. The state specifically argued in rebuttal against giving Lankford "the most lenient treatment," despite the fact that the court had earlier ruled the state was obligated to recommend an indeterminate life sentence, the most lenient sentence available for the crimes for which Lankford had been convicted.

At the outset of the resentencing proceeding, the district court instructed the prosecution that it had to walk a "fine line" in presenting evidence in aggravation while at the same time still bound to the original recommendation for an indeterminate life sentence. A review of the evidence and arguments indicates that the fine line was crossed many times. Allowing the state to make the arguments and introduce the evidence in aggravation to the extent that was done was reversible error, because it was so fundamentally at odds with the position the state was obligated to recommend that it amounted to a violation of the agreement. In this case the state was bound to a plea agreement for the minimum sentence that could be

imposed. The evidence and arguments submitted by the state clearly called for a greater sentence.

Lankford's suggestion that no evidence in aggravation could be introduced is more of a remedy than he is entitled to receive. The district court could exercise its powers under I.C.R. 32(f) to order additional investigation on the question of evidence in aggravation. The court could have required the prosecution to issue subpoenas, or issued subpoenas of its own and then questioned the witnesses. *See* I.R.E. 614. This would have allowed the court to consider the evidence for purposes of analyzing the statutory aggravating circumstances without involving the prosecution in the presentation of evidence in contravention of the plea agreement and the prohibition against vindictive prosecution. The sentences imposed are vacated and the case is remanded for resentencing with orders that the district court employ a procedure that does not involve the prosecution in the presentation of evidence in aggravation.[5]

The remaining question is whether the sentencing judge should remain the sentencing judge on remand. So there can be no suggestion that the sentence ultimately imposed on remand, whatever it may be, is in any way a product of the residual effects of the state's submission of

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[5] Of course, the resentencing will entail only a choice between a fixed or an indeterminate life sentence. This Court has previously held that once a life sentence has been imposed, as in this case, double jeopardy bars imposition of the death sentence should resentencing occur after a successful appeal. *See State v. Caudill*, 109 Idaho 222, 706 P.2d 456 (1985) (citing *Arizona v. Rumsey*, 467 U.S. 203, 104 S. Ct. 2305 (1984)).

aggravating evidence and arguments, resentencing shall be by a judge who has not heard the evidence or arguments.

IV. THIS COURT HAS ALREADY RULED THAT THE IMMUNITY AGREEMENT DID NOT PROVIDE LANKFORD WITH IMMUNITY FOR THE MURDERS

As he has argued before this Court previously, Lankford contends that he was granted transactional immunity for all matters included in his testimony against Mark Lankford, including the murder of the Bravences. According to Lankford, the grant of transactional immunity prohibited any punishment for matters included within his testimony and barred the district court from imposing sentence. Despite Lankford's insistence that this claim was previously decided wrongly, it was nevertheless decided that:

> [t]he district court did not err when it found that the immunity agreement (Defendant's Exhibit #1) between the state and Lankford did not immunize Lankford from sentencing for the crimes for which he had already been convicted when the agreement was entered into. . . . Instead of providing retroactive protection, the immunity agreement was prospective in effect and protected Lankford from any other charges that might have been brought pursuant to his use of the Bravences' property.

State v. Lankford, 113 Idaho 688, 695-96, 747 P.2d 710, 717-18 (1987).

Lankford contends that res judicata is not a bar to relitigation of the issue relying on *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988). However, the very narrow exceptions to res judicata described in *Aragon* were for instances of ineffective assistance of counsel, newly discovered evidence, or changes in the controlling law. *Id.* at 766 n.12, 760 P.2d at 1182 n.12. None of those circumstances exists here.

Lankford's original brief filed in 1986, made substantially the same arguments when the claim was first presented to the Court. Lankford's suggestion that the Court overlooked his argument that the immunity agreement was transactional is not correct. The Court agreed that it was an agreement for transactional immunity but simply disagreed with Lankford about what transactions were covered. The Court will not revisit this claim.

V. THE DISTRICT COURT CORRECTLY DENIED LANKFORD'S MOTION FOR RECUSAL

The issue concerning Lankford's motion to recuse the sentencing judge is moot in light of the fact that sentencing will take place before a different judge. However, the court will address the question briefly to settle matters in the record.

The sentencing judge took a guided tour of death row. Initially, the defense had no objection based on this disclosure and even discussed having the judge briefly occupy a cell in order to better understand the type of confinement Lankford had experienced. Yet when the court reconvened after the weekend, the defense had filed a recusal motion based on the judge's prison tour.

On the tour the sentencing judge spoke briefly to Sgt. Taylor, a witness who had testified for the prosecution about Lankford's behavior in prison.[6] Sergeant Taylor was on duty in the death row unit but did not accompany the tour group. There was no discussion of the case.

Lankford relies on cases from other jurisdictions involving ex parte contacts in sentencing procedures where the substance of the contact was, or could have been, relevant to the sentencing determination. By contrast, Lankford's claim is that even though nothing of substantive relevance was discussed by the trial judge and Sgt. Taylor, the contact could nevertheless have potentially impacted the sentencing procedure because the sentencing judge's assessment of Sgt. Taylor's credibility might have been affected. Lankford cites to no decision where such an attenuated impact on the sentencing procedure has been condemned as an impermissible ex parte contact, and this Court has discovered none.

In *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993), the defendant sought to disqualify the judge in post-conviction proceedings based on the fact that the judge and the prosecutor had communicated about some administrative matters not involving the merits of the case. This Court affirmed the trial court's denial of the motion based on the defendant's inability to demonstrate any prejudice resulting from the communications and the judge's representation that the merits of the case had not been discussed. *Id.* at 566, 873 P.2d at 820.

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[6] Sgt. Taylor testified on April 5, 1993. On April 12, 1993, Judge Schilling stated that the tour had taken place the "day before yesterday."

While *Pratt* involved contact with a prosecutor rather than a prosecution witness, the interaction was as innocuous as what occurred in this case. Lankford's suggestion that any interaction between two people necessarily contributes to an assessment of credibility is simply too broad. There is no evidence in the record indicating that the sentencing judge received the type of information from Sgt. Taylor during the prison tour which one would expect a person to rely upon in formulating a credibility determination. Lankford's claim lacks support in fact and runs contrary to common experience. The denial of the motion to recuse is affirmed.

VI. REVIEW OF THE SENTENCES IS MOOT

Although Lankford appeals the sentences imposed as an abuse of discretion, review of the sentences imposed has been rendered moot by our rulings, and we explicitly decline to express any opinion on the sentences which might impact the decision on remand.

VII. CONCLUSION

The sentences imposed by the district court are vacated. We remand for resentencing in which the prosecution is obligated to make its initial recommendation for an indeterminate life sentence and is not allowed to present evidence in aggravation. Resentencing shall be conducted by a district judge who has not been exposed to the state's impermissible presentation of evidence in aggravation.

Chief Justice McDEVITT, Justices JOHNSON and SILAK **CONCUR.**

Justice TROUT concurring in all but Part III; to Part III, concur in part and dissent in part.

I write only to indicate my dissent from that portion of the opinion which remands this case for sentencing before another district judge. While Judge Schilling may have been exposed to information in aggravation which he would not otherwise have heard, I do not believe that it necessitates removing him from any further consideration of this case. We presume that judges are able to exclude from consideration any improper or inadmissible evidence. "That judges are capable of disregarding that which should be disregarded is a well accepted precept in our judicial system." *Sivak v. State,* 112 Idaho 197, 205, 731 P.2d 192, 200 (1986) (citations omitted). Whether a judge's involvement in a case reaches a point where disqualification from further participation becomes necessary is left to the sound discretion of the trial judge himself. *Id.* at 207, 731 P.2d at 201. I see no reason to deviate from that principle in this instance.

In the Supreme Court of the State of Idaho

STATE OF IDAHO,	)	
Plaintiff-Respondent,	)	ORDER DENYING PETITION FOR REHEARING
v.	)	
BRYAN STUART LANKFORD,	)	NO. 20672
Defendant-Appellant.	)	Reh. No. 95RH-37

The Respondent having filed a PETITION FOR REHEARING on September 18, 1995, and supporting BRIEF on October 16, 1995, of the Court's Opinion released September 1, 1995; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 30th day of October, 1995.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Ron Schilling